

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

KATIE N. FISCHMAN,	)	No. CV 08-7720-RC
	)	
Plaintiff,	)	
	)	OPINION AND ORDER
v.	)	
	)	
MICHAEL J. ASTRUE,	)	
Commissioner of Social Security,	)	
	)	
Defendant.	)	
_____	)	

Plaintiff Katie N. Fischman filed a complaint on November 24, 2008, seeking review of the Commissioner's decision denying her application for disability benefits. On April 27, 2009, the Commissioner answered the complaint, and the parties filed a joint stipulation on July 1, 2009.

**BACKGROUND**

On April 27, 2005, plaintiff filed an application for disability benefits under Title II of the Social Security Act ("Act"), 42 U.S.C. § 423, claiming an inability to work since October 30, 2000, due to "venous thrombosis caused from a blood condition. Legally blind in the left eye, minus 8 in the right eye." Certified Administrative

1 Record ("A.R.") 93-97, 118. The plaintiff's application was initially  
2 denied on August 18, 2005, and was denied again on December 2, 2005,  
3 following reconsideration. A.R. 53-64. The plaintiff then requested  
4 an administrative hearing, which was held before Administrative Law  
5 Judge Sally C. Reason ("the ALJ") on May 31, 2006. A.R. 65-66, 228-  
6 47. On June 28, 2006, the ALJ issued a decision finding plaintiff is  
7 not disabled. A.R. 37-45. The plaintiff appealed this decision to  
8 the Appeals Council, which vacated the ALJ's decision and remanded for  
9 further proceedings on November 24, 2007. A.R. 49-52, 80, 84-88.

10  
11 The ALJ then conducted another administrative hearing on  
12 March 10, 2008. A.R. 248-63. On April 16, 2008, the ALJ issued a new  
13 decision again finding plaintiff is not disabled. A.R. 15-25. The  
14 plaintiff appealed the decision to the Appeals Council, which denied  
15 review on September 26, 2008. A.R. 7-14, 221-27.

## 16 17 DISCUSSION

### 18 I

19 The Court, pursuant to 42 U.S.C. § 405(g), has the authority to  
20 review the decision denying plaintiff disability benefits to determine  
21 if the Commissioner's findings are supported by substantial evidence  
22 and whether he used the proper legal standards in reaching his  
23 decision. Vasquez v. Astrue, 572 F.3d 586, 591 (9th Cir. 2009);  
24 Vernoff v. Astrue, 568 F.3d 1102, 1105 (9th Cir. 2009). The claimant  
25 is "disabled" for the purpose of receiving benefits under the Act if  
26 she is unable to engage in any substantial gainful activity due to an  
27 impairment which has lasted, or is expected to last, for a continuous  
28 period of at least twelve months. 42 U.S.C. § 423(d)(1)(A); 20 C.F.R.

1 § 404.1505(a). "The claimant bears the burden of establishing a prima  
2 facie case of disability." Roberts v. Shalala, 66 F.3d 179, 182 (9th  
3 Cir. 1995), cert. denied, 517 U.S. 1122 (1996); Smolen v. Chater, 80  
4 F.3d 1273, 1289 (9th Cir. 1996).

5  
6 The Commissioner has promulgated regulations establishing a five-  
7 step sequential evaluation process for the ALJ to follow in a  
8 disability case. 20 C.F.R. § 404.1520. In the **First Step**, the ALJ  
9 must determine whether the claimant is currently engaged in  
10 substantial gainful activity. 20 C.F.R. § 404.1520(b). If not, in  
11 the **Second Step**, the ALJ must determine whether the claimant has a  
12 severe impairment or combination of impairments significantly limiting  
13 her from performing basic work activities. 20 C.F.R. § 404.1520(c).  
14 If so, in the **Third Step**, the ALJ must determine whether the claimant  
15 has an impairment or combination of impairments that meets or equals  
16 the requirements of the Listing of Impairments ("Listing"), 20 C.F.R.  
17 § 404, Subpart P, App. 1. 20 C.F.R. § 404.1520(d). If not, in the  
18 **Fourth Step**, the ALJ must determine whether the claimant has  
19 sufficient residual functional capacity despite the impairment or  
20 various limitations to perform her past work. 20 C.F.R. §  
21 404.1520(f). If not, in **Step Five**, the burden shifts to the  
22 Commissioner to show the claimant can perform other work that exists  
23 in significant numbers in the national economy. 20 C.F.R. §  
24 404.1520(g).

25  
26 Applying the five-step sequential evaluation process, the ALJ  
27 found plaintiff has not engaged in substantial gainful activity  
28 between her alleged onset date of October 30, 2000, and her date last

1 insured of December 31, 2005. (Step One). The ALJ then found  
2 plaintiff has the following severe impairments: "blindness in the  
3 left eye with a history of central retinal vein occlusion, and retinal  
4 degeneration in both eyes" (Step Two); however, she does not have an  
5 impairment or combination of impairments that meets or equals a  
6 Listing. (Step Three). The ALJ further determined plaintiff cannot  
7 perform her past relevant work as a travel agent or travel agency  
8 manager. (Step Four). Finally, the ALJ concluded plaintiff can  
9 perform a significant number of jobs in the national economy;  
10 therefore, she is not disabled. (Step Five).

## 11 12 II

13 A claimant's residual functional capacity ("RFC") is what she can  
14 still do despite her physical, mental, nonexertional, and other  
15 limitations. Mayes v. Massanari, 276 F.3d 453, 460 (9th Cir. 2001);  
16 see also Valentine v. Comm'r, Soc. Sec. Admin., 574 F.3d 685, 689 (9th  
17 Cir. 2009) (RFC is "a summary of what the claimant is capable of doing  
18 (for example, how much weight he can lift)."). Here, the ALJ found  
19 plaintiff has the RFC "to perform a full range of work at all  
20 exertional levels but with the following nonexertional limitations: no  
21 work requiring good binocular vision, good depth perception, or full  
22 peripheral vision." A.R. 21. However, plaintiff contends this  
23 finding, as well as the Step Five determination, are not supported by  
24 substantial evidence because the ALJ erroneously concluded she was not  
25 a credible witness and failed to properly consider the opinion of her  
26 treating physician.

27  
28 The plaintiff testified at the administrative hearing that she is

1 unable to work because every time she reads "a little bit" her "eyes  
 2 go" or blur and she experiences "severe pain," and then plaintiff has  
 3 a panic attack. A.R. 231, 236, 239-40, 243, 260. The plaintiff  
 4 explained she cannot do paperwork or computer work and cannot read for  
 5 any length of time -- no more than a couple of paragraphs to a page --  
 6 before she experiences blurriness and eye pain. A.R. 233-35. Once  
 7 the eye pain starts, plaintiff testified she gets "a nasal drip" and  
 8 then "start[s] to get really nervous because the pain can be really  
 9 bad" and she feels as if she is going to go blind. A.R. 235-36.

10  
 11 Once a claimant has presented objective evidence that she suffers  
 12 from an impairment that could cause pain or other nonexertional  
 13 limitations,<sup>1</sup> the ALJ may not discredit the claimant's testimony  
 14 "solely because the degree of pain alleged by the claimant is not  
 15 supported by objective medical evidence." Bunnell v. Sullivan, 947  
 16 F.2d 341, 347 (9th Cir. 1991) (en banc); Moisa v. Barnhart, 367 F.3d  
 17 882, 885 (9th Cir. 2004). Thus, if the ALJ finds the claimant's  
 18 subjective complaints are not credible, she "must provide specific,  
 19 cogent reasons for the disbelief.'" Greger v. Barnhart, 464 F.3d 968,  
 20 972 (9th Cir. 2006) (citations omitted); Orn v. Astrue, 495 F.3d 625,  
 21 635 (9th Cir. 2007). Furthermore, if there is medical evidence  
 22 establishing an objective basis for some degree of pain and related  
 23 symptoms, and no evidence affirmatively suggesting that the claimant  
 24 is malingering, the ALJ's reasons for rejecting the claimant's

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 26 <sup>1</sup> "While most cases discuss excess pain testimony rather  
 27 than excess symptom testimony, rules developed to assure proper  
 28 consideration of excess pain apply equally to other medically  
 related symptoms." Swenson v. Sullivan, 876 F.2d 683, 687-88  
 (9th Cir. 1989).

1 testimony must be "clear and convincing." Morgan v. Comm'r of the  
2 Soc. Sec. Admin., 169 F.3d 595, 599 (9th Cir. 1999); Vasquez, 572 F.3d  
3 at 591 (9th Cir. 2009).

4  
5 The ALJ discredited plaintiff's testimony, finding plaintiff's  
6 "statements concerning the intensity, persistence and limiting effects  
7 of [her] symptoms [were] not credible to the extent they [were]  
8 inconsistent with the [RFC] assessment for [several] reasons[,] A.R.  
9 21, including that plaintiff "did not indicate any restriction in her  
10 ability to perform normal activities of daily living (other than  
11 difficulty reading) due to her visual condition during the period in  
12 question." A.R. 23. However, "[t]he ALJ must make 'specific findings  
13 relating to [the claimant's daily] activities' and their  
14 transferability [to the workplace] to conclude that a claimant's daily  
15 activities warrant an adverse credibility determination." Orn, 495  
16 F.3d at 639 (citation omitted); see also Vertigan v. Halter, 260 F.3d  
17 1044, 1049 (9th Cir. 2001) ("With respect to daily activities, . . .  
18 if a claimant 'is able to spend a *substantial part* of [her] day  
19 engaged in pursuits involving the performance of physical functions  
20 that are transferable to a work setting, a specific finding as to this  
21 fact may be sufficient to discredit a claimant's allegations.'" (quoting Morgan, 169 F.3d at 600)); Gonzalez v. Sullivan, 914 F.2d  
22 1197, 1201 (9th Cir. 1990) (If daily activity evidence is used to  
23 rebut claims of nonexertional limitations, the ALJ must find "the  
24 ability to perform those daily activities translate[s] into the  
25 ability to perform appropriate work."). Here, the ALJ made no such  
26 findings, and her conclusory reference to daily living activities -  
27 with absolutely no discussion of what those activities involve or how  
28

1 such activities translate into an ability to work - cannot support the  
2 ALJ's negative credibility assessment. Orn, 495 F.3d at 639;  
3 Vertigan, 260 F.3d at 1049-50.

4  
5 The ALJ also based her adverse credibility determination on the  
6 finding that plaintiff "does not appear to be taking any prescribed  
7 medications." A.R. 23. However, since there is apparently no  
8 treatment for plaintiff's eye condition that requires prescription  
9 medication, A.R. 123, 155, 184, 186, this, too, is not a clear and  
10 convincing reason for rejecting plaintiff's testimony. Regennitter v.  
11 Comm'r of the Soc. Sec. Admin., 166 F.3d 1294, 1296 (9th Cir. 1999).

12  
13 Further, the ALJ found plaintiff's "contention of a lack of  
14 ability to perform any paperwork or computer work with her remaining  
15 right eye vision due to eye strain and headaches is not supported by  
16 the medical evidence for the period through December 31, 2005." A.R.  
17 23. However, since this finding is grossly conclusory, and the ALJ  
18 did not further elaborate on it, this finding also does not provide a  
19 clear and convincing reason for rejecting plaintiff's testimony. See  
20 Regennitter, 166 F.3d at 1297 (An ALJ's determination that claimant's  
21 complaints are inconsistent with clinical findings "could satisfy the  
22 requirement of a clear and convincing reason for discrediting a  
23 claimant's testimony, except that the ALJ did not specify what  
24 complaints are contradicted by what clinical observations." ).  
25 Moreover, "[t]he fact that a claimant's testimony is not fully  
26 corroborated by the objective medical findings, in and of itself, is  
27 not a clear and convincing reason for rejecting it." Vertigan, 260  
28 F.3d at 1049; see also Cotton v. Bowen, 799 F.2d 1403, 1407 (9th Cir.

1 1986) ("It is improper as a matter of law to discredit excess pain  
2 testimony solely on the ground that it is not fully corroborated by  
3 objective medical findings."). In any event, even assuming *arguendo*  
4 the ALJ relied on the fact that on visual acuity tests plaintiff's  
5 corrected vision in the right eye is between 20/30 and 20/50, see A.R.  
6 22, such testing does **not** conflict with plaintiff's complaints that  
7 she experiences blurred vision and pain after reading no more than a  
8 couple of paragraphs to a page; rather, plaintiff's complaint is not  
9 that she cannot see out of her right eye at all, but that when she  
10 uses her right eye to read for a few minutes, her vision blurs and she  
11 has eye pain.<sup>2</sup> Such complaints are not inconsistent with the ability  
12 to read a few lines on an eye chart; therefore, this is not a clear  
13 and convincing reason for rejecting plaintiff's testimony. Vasquez,  
14 572 F.3d at 592-93.

15  
16 Finally, the ALJ's finding of a normal consultative internal  
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18 <sup>2</sup> The Court notes that plaintiff's medical records from  
19 Kaiser Permanente document plaintiff's long-standing complaints  
20 of right eye pain, triggered primarily by work-related  
21 activities. For instance, on December 28, 2000, shortly after  
22 plaintiff stopped working, an ophthalmologist at Kaiser  
23 Permanente examined plaintiff, diagnosed her with intermittent  
24 deep eye pain, and reported plaintiff complained of deep eye pain  
25 off-and-on and she usually experiences such pain while working on  
26 a computer at work. A.R. 207. This physician also noted  
27 plaintiff did not work over the holidays and did not experience  
28 any deep eye pain. Id. On January 2001, Dr. Weingarten, an  
ophthalmologist at Kaiser, diagnosed plaintiff with eye pain,  
etiology unknown, and noted plaintiff complained of deep eye pain  
for the past three days. A.R. 205. On March 22, 2001, Dr.  
Weingarten noted plaintiff indicated she can only focus for 10-15  
minutes and then gets deep pain and floaters, and on April 5,  
2001, Dr. Weingarten noted that a pain clinic referral should be  
considered. A.R. 203.



1 examination in July 2005 by Ursula Taylor, M.D., A.R. 23, does not  
2 support the ALJ's adverse credibility finding since Dr. Taylor, an  
3 internist, did not specifically address plaintiff's eye pain despite  
4 her complaints of eye pain and fatigue with overuse. A.R. 157-62.  
5 Similarly, the ALJ's findings that plaintiff "has no other physical or  
6 mental impairments" and has "never received any counseling or other  
7 treatment" for nervousness and occasional "panic attacks" do not  
8 support the ALJ's adverse credibility determination because they do  
9 not address plaintiff's testimony about her eye condition, which is  
10 the impairment that prevents plaintiff from working.

11  
12 For all these reasons, the ALJ did not provide clear and  
13 convincing reasons for discrediting plaintiff's testimony; thus, the  
14 RFC determination, which does not reflect plaintiff's testimony, is  
15 not supported "by substantial evidence based on the record as a  
16 whole." Reddick v. Chater, 157 F.3d 715, 724 (9th Cir. 1998);  
17 Lingenfelter v. Astrue, 504 F.3d 1028, 1040 (9th Cir. 2007). "Nor  
18 does substantial evidence support the ALJ's step-five determination,  
19 since it was based on this erroneous RFC assessment." Lingenfelter,  
20 504 F.3d at 1041.

### 21 22 III

23 When the Commissioner's decision is not supported by substantial  
24 evidence, the Court has authority to affirm, modify, or reverse the  
25 Commissioner's decision "with or without remanding the cause for  
26 rehearing." 42 U.S.C. § 405(g); McCartey v. Massanari, 298 F.3d 1072,  
27 1076 (9th Cir. 2002). "Remand for further administrative proceedings  
28 is appropriate if enhancement of the record would be useful." Benecke

1 v. Barnhart, 379 F.3d 587, 593 (9th Cir. 2004); Harman v. Apfel,  
2 211 F.3d 1172, 1178 (9th Cir.), cert. denied, 531 U.S. 1038 (2000).  
3 Here, since there are "insufficient findings as to whether claimant's  
4 testimony should be credited as true," remand is the appropriate  
5 remedy.<sup>3</sup> Connett v. Barnhart, 340 F.3d 871, 876 (9th Cir. 2003).  
6

7 **ORDER**

8 IT IS ORDERED that: (1) plaintiff's request for relief is  
9 granted; and (2) the Commissioner's decision is reversed, and the  
10 action is remanded to the Social Security Administration for further  
11 proceedings consistent with this Opinion and Order, pursuant to  
12 sentence four of 42 U.S.C. § 405(g), and Judgment shall be entered  
13 accordingly.  
14

15 DATE: February 3, 2010

/S/ ROSALYN M. CHAPMAN  
ROSALYN M. CHAPMAN  
UNITED STATES MAGISTRATE JUDGE

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26 <sup>3</sup> Having reached this conclusion, it is unnecessary to  
27 address the other claim plaintiff raises, which would not provide  
28 plaintiff any further relief than herein granted.